

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
APPENDIX**

ORIGINAL

77-1175

**United States Court of Appeals
For the Second Circuit**

UNITED STATES OF AMERICA,

Appellee,

-against-

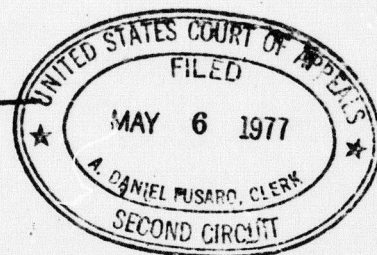
MIGUEL RUSSO, et al.,

Appellant.

*On Appeal from a Judgment of Conviction
in the United States District Court for
the Eastern District of New York*

APPENDIX FOR APPELLANT MIGUEL RUSSO

**NANCY ROSNER
Attorney for Appellant Russo
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D. C. Form No. 103
GRIMINAL DOCKET

73 CR 164

1A

WEINSTEIN
MISHLER

TITLE OF CASE		ATTORNEYS
THE UNITED STATES		For U.S.: FRIED
vs.		for deft. CHIAPPE:
✓ FRANCOIS ROSSI, a/k/a "Marcello"		Joseph Gino Gallina 30 Broad St., NYC.
PAUL PAGANACCI		100-1060
✗ MIGUEL RUSSO		RUSCO-Nancy Rosner 401 Broad way N.Y. 925-8844
ELIO PAOLO GIGANTE		
MARIANO WARDEN		For Defendant: ROSSI:
FELICE BONETTI		Albert Krieger 745-56pe
CESAR MELCHIORE and		401 Broadway, N.Y.C.
JOHN DOE, a/k/a "Dino"		925-5937

Did import heroin into the U.S.

ABSTRACT OF COSTS	AMOUNT	CASH RECEIVED AND DISBURSED			
		DATE	NAME	RECEIVED	DISBURSED
Fine, (ROSSI)	20000.00	5-12-76	Noted Appen { Russo	5	-
Clerk,		5-12-76	Re Treas		5
Marshal,		3-9-77	Noted Appen { Chas Treas	5	-
Attorney,		3-10-77	Paul H Treas		5
Commissioner's Court,		3-9-77	Noted Appen { Russo	5	-
Witnesses,		3-10-77	Paul H Treas		5

DATE	PROCEEDINGS
2-15-73	Before WEINSTEIN J - Indictment filed and ordered sealed by the Court. Bench Warrants Ordered for all defts. 20000000
2-16-73	Bench Warrants Issued.
2-16-73	By MISHLER, CH J - Ordered that the above captioned indictment be opened by the Court for the limited purpose of reproducing as many copies of the indictment as are necessary for extradition proceedings concerning fugitives named as defts, therein and it is further Ordered that, after the above reproduction has been completed, the Indictment be resealed and not made public (except in connection with extradition proceedings)
2-23-73	Grand Jury Minutes of Feb. 15, 1973 filed.
2-23-73	Affidavits of THOMAS S. SUGGIE filed. Two Affidavits filed.
2-23-73	Affidavits of THOMAS S. SUGGIE filed.

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DATE	PROCEEDINGS
2-23-73	Bench Warrant ret'd and filed unexecuted (228X73X26013X26013)
3-3-73	Four Affidavits, 2 Bench Warrants (unexecuted) placed in sealed vault.
3-27-73	Three Affidavits filed. Placed in sealed vault.
10/75	Before MISHLER, CH.J. - Case called- Deft FRANCOIS ROSSI produced in Court on Bench warrant-Interpreter present- Indictment ordered unsealed-Deft to retain counsel-Bail set at \$5,000.000.00- court advised deft of his rights Pleading xxx set for 7/18/75 at 11:00 A.M.
7-16-75	Notice of Appearance filed as to deft FRANCISCO ROSSI.
7-16-75	Letter filed received from Chambers re deft ROSSI(undated)
7-16-75	Before MISHLER, CH J - case called - deft ROSSI & counsel Albert Krieger present - deft arraigned and enters a plea of not guilty on all 4 indictments(73 CR-164; 73 CR-195;73 CR 239 and 72 CR-1162. Case set down for July 31, 1975 at 9:30 am to set a date for trial.
	3 Affidavits marked Govts. Ex. 1, 2, & 3 for Identification in this case. Interpreter Albert Boyne present.
7-31-75	Before MISHLER, CH J - case called - deft ROSSI & counsel Albert J. Krieger present - Interpreter L.Clancy present - deft waived rights to a speedy trial - case set down for trial on Jan. 5, 1976.
8/4/75	Certificate of engagement filed
8-15-75	Before MISHLER, CH J - On motion of Asst. U.S. Atty. Puccio indictment ordered unsealed - further, any relating documents sealed and placed in court safe are to be unsealed and filed and placed in respective file. (see 72 CR-1162, 73 CR 239 and 73 CR 195)
822-75	Bench Warrant (ARCANO) Affidavit of MICHELE SIMONE NICOLI and Affidavit of VICTOR J. ROCCO filed.
9/2/75	Stenographers Transcript dated 7/16/75 filed
9-12-75	Notice of Motion filed & affidavit, for an order modifying bail and bail conditions presently existing etc.(deft FRANCOIS ROSSI, ret.9-19-75 at 9:30 am)
19/75	Before MISHLER, CH.J. - Case called- Motion withdrawn (Deft's motion for an modifying the bail and bail conditions presently existing, etc.) F. ROSSI
11/3/75	Stenographers Transcript dated 10/10/75 filed
12/8/75	Petition for writ of prohibition, etc. filed
-5-76	Before MISHLER, CH J - case called - deft Rossi & counsel Albert Krieger present - Interpreter M.Mensa present. Interpreter L.Clancy present - trial ordered and begun - Jurors selected and sworn -Interpreter Maria Elana Cardenas present - Trial contd to Jan. 6, 1976 at 10:00 am.

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CRIMINAL DOCKET

JA
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DATE	PROCEEDINGS
1-6-76	Before MISHLER, CH J - case called - deft Rossi & counsel Albert Krieger present - Interpreter Maria Cardenas present - trial resumed - Trial contd to Jan. 7, 1976.
1-7-76	Before MISHLER, CH J - case called - deft ROSSI & counsel present - Interpreter Maria Cardenas present - trial resumed - trial contd to Jan. 8, 1976.
1-8-76	Before MISHLER, CH J - case called - deft Rossi & atty present - Interpreter M.Cardenas & M.Mensa present - trial resumed - Trial contd to 1-12-76.
1-12-76	Before MISHLER, CH J - case called - deft Rossi & counsel present - trial resumed - Interpreter M.Cardenas present - Govt rests - motion by deft for Judgment of Acquittal is denied - deft rests - trial contd to Jan. 13, 1976.
1-13-76	Before MISHLER, CH J - case called - deft & counsel present - Interpreter M.Cardenas present - trial resumed - motion by deft for mistrial is denied - trial contd to Jan. 14, 1976
1-13-76	By MISHLER, CH J - Order of sustenance signed (Lunch)
1-14-76	6 stenographers transcripts filed (pgs 1 to 927)
1-14-76	Before MISHLER, CH J - case called - deft Rossi & counsel A.J.Krieger present - Interpreter M.Cardenas present - trial resumed - At 11:10 AM the jury retired for deliberations - Jury returns with a verdict of guilty at 4:10 PM - Jury polled and Jury discharged - all motions reserved until time of sentence - sentence adjd without date - trial concluded.
1-14-76	Two Orders of sustenance filed (lunch & coffee etc)
1-15-76	Stenographers transcript filed dated Jan. 14, 1976
3-19-76	Before MISHLER, CH J - case called - sentence adjd to 4-5-76 at 9:30 am (Rossi)
4-5-76	Before MISHLER, CH J - case called - sentence adjd to 4-27-76 at 9:30 am (Rossi)
4-27-76	Before MISHLER, CH J - case called - sentence as to deft ROSSI adjd to May 12, 1976 at 9:30 am.
5-12-76	Before MISHLER, CH J - case called - deft ROSSI & counsel Albert Krieger present - Interpreter L.Clancy present - deft sentenced to a term of imprisonment of 20 years and a fine of \$20,000 - sentence to be computed from Feb. 9, 1973 Clerk to file Notice of Appeal.
5-12-76	Judgment & Commitment filed - certified copies to Marshal (ROSSI)

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DATE	PROCEEDINGS
5-12-76	Notice of appeal filed. (ROSSI)
5-12-76	Docket entries and duplicate of Notice of Appeal mailed to the Court of appeals
5-14-76	Judgment & commitment ret'd and filed - deft. del. to MCC, NY
5-11-76	Order received from the Court of Appeals that the Index to this case be deleted on or before June 14, 1976 (ROSSI)
5/27/76	Before MISHLER, CH. J. - Case called- defts RUSSO and CHIAPPE present without counsel- interpreter present- court to appoint counsel Bail set at \$2500.00 as to each deft (surety Co. bond)- bail to cover this case adn 73CR239- arraignment set down for 6/4/76- trial set for 6/28/76
5/27/76	Financial affidavits filed (both defts)
6/1/76	Letters from Judge Mishler to deft Russo and Chiappe dated 5/28/76 filed
6-1-76	Notice of appearance filed (Francois Chiappe)
6-2-76	Stenographers transcript filed dated May 12, 1976
6/3/76	Letter from Gino Gallina dated 6/1/76 filed
6/4/76	Before MISHLER, CH. J. - Case called- defts and counsel present- interpreter sworn- defts arraigned and each enter plea of not guilty-trial set for 6/28/76 (CHIAPPE and RUSSO)
6/4/76	Notices of appearances file (both defts)
6/7/76	Record on appeal certified and mailed to court of appeals (ROSSI)
6/10/76	Acknowledgment received from court of appeals for receipt of record
6/11/76	Letter from Gino Gallina dated 6/7/76 filed
6-14-76	Stenographers transcript filed dated May 27, 1976.
6-14-76	Before MISHLER, CH J - case called - defts Russo & Chiappe & counsel present - motion argued by the Govt to adjourn the trial date of June 28, 1976; motion denied as indicated on the record.
6-15-76	Judgment & commitment ret'd and filed - Deft ROSSI delivered to U.S.P. Marion, Ill.
6-17-76	Stenographers transcript dated June 4, 1976 filed (RUSSO & CHIAPPE)
6-22-76	Affidavits of GINO GALLINA and unsigned order filed received from Chambers and placed in this file.
6-23-76	Before MISHLER, CH J - case called - motion for discovery argued - Govt consented to turn over discovery as indicated on the record (Russo)
6-24-76	Copy of letter from Judge Mishler dtd 6-23-76 with annexed letter from Albert Krieger dtd 6-23-76 filed.
6-24-76	Copy of letter from Judge Mishler to Warden Taylor dtd 6-22-76 filed.

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DATE	PROCEEDINGS
6-25-76	Notice of motion filed, ret. June 28, 1976, for for adjournment of trial etc. (this motion adjd to Oct. 4, 1976)
6-28-76	Before MISHLER, CH J - case called - adjd without date for trial - deft Chiappe ill - possible severance from trial.
6-29-76	stenographers transcript filed dated June 28, 1976
6-30-76	Stenographers transcript filed dated June 29, 1976
7-6-76	Letter from Larry F Taylor dtd 6-28-76 filed.
7/7/76	Before PLATT, J.- Case called- deft and counsel present- interpreter sworn- deft's motion to suppress- decision reserved- jurors selected and sworn-deft's motion for an order supplying daily transcript granted trial contd to 7/8/76 (RUSSO)
7-8-76	Order appointing counsel filed.
7-8-76	Before MISHLER, CH. J. - Case called. All defts & counsel present. Trial resumed. Immunity order signed by the Court. The witness Richard Bacetta refused to answer any questions put before him and the Court held him in contempt of court. Witness Richard Bacetta sentenced to imprisonment for a period of 6 months or until verdict of the case on trial, whichever comes first. Execution of sentence is stayed until 7-9-76 by 2 P.M. Trial continued to 7-9-76 at 10 AM.
7-9-76	Before PLATT, J. - Case called. deft & counsel present. Jury retires for deliberations at 10:40 a.m. Jury is excused by the Court at 5:50 p.m. to continue deliberations on 7-12/76 at 10:00 a.m. (RUSSO)
7-12-76	Before MISHLER, CH J - case called - deft & counsel present 0 (Miguel Russo) trial contd - jury resumes deliberations - court declares a mistrial - The Jury is excused with the thanks of the court.
7-13-76	By Platt, J - 2 orders of sustenance filed (July 9 and July 12 Lunch)
7-13-76	Before MISHLER, CH J - case called motion by deft RUSSO for a speedy trial and for reduction of bail adjd to July 6, 1976. (RUSSO)
7-16-76	Before MISHLER, CH J - case called- 8-5-76 for trial (RUSSO)
7-20-76	Voucher for compensation for expert services filed. (RUSSO)
7/20/76	Voucher for compensation for expert services filed. (RUSSO)
7/22/76	Stenographers transcript dtd 7/9/76 filed. (RUSSO)
8-6-76	Before MISHLER, CH J - case called - deft Russo & counsel present- Interpreter L. Clancy present - deft Chiappe not present with counsel - Nov. 15, 1976 for trial. RUSSO & CHIAPPE code I start 8-16-76 limited to 11-15-76

DATE	PROCEEDINGS
9-76	Certificate of engagement filed setting case for trial Nov. 15, 1976.
9/2/76	Stenographers transcript dated 7/6/76 at 10:00 a.m. (MIGUEL RUSSO).
9-15-76	copy of letter filed received from Chambers to counsel Nancy Rosner, Esq. re deft Miguel Russo etc.
9-20-76	Copy of letter from chambers dtd 9-17-76 setting trial for 11-8-76 filed.
9/21/76	Letter to Counsel Nancy Rosner from Judge Mishler dated 9/21/76 filed. (RUSSO CHIAPPE)
9/21/76	Motion to dismiss the indictment, Motion for foreign depositions, in connection with the Toscanino motion, and Motion for foreign deposition with the pending trial all returnable 10/8/76 filed and forwarded to chambers (FRANCOIS CHIAPPE).
10/6/76	Defts memorandum of law in support of motions to dismiss indictment and for foreign depositions filed and forwarded to chambers. (FRANCOIS CHIAPPE).
10-8-76	Before MISHLER, CH. J. - Case called. All defts motions and all Govt's answering affidavits to be submitted by 10-13-76.
10-13-76	By MISHLER, CH. J. - Order filed granting leave to take foreign depositions and for issuance of commissions
10-14-76	Letter filed dated Oct. 7 and reply to counsel Nancy Rosner, Esq. counsel for deft RUSSO that trial date is adjd to Nov. 22, 1976, etc.
10-14-76	Letter filed received from Chambers dated June 17, 1976 re deft CHIAPPE from Joel Brenner, Esq.
10-22-76	Order filed received from the Court of appeals that the matter be remanded to Ch. Judge Mishler for the purpose of having the original or copies of documents transmitted between the U.S. and Spain relating to the arrest and extradition of appellant Francois Rossi identified and returned to this Court for consideration and appeal.
10-22-76	Before DOOLING J - case called -pursuant to Order of U.S. Court of Appeals for the Second Circuit, dated Oct. 20, 1976, the following were received as court exhibits to be transmitted to the court of appeals Court Ex. No. 1--Note 2 Verbale (Spanish) dated July 14, 1973; Court Ex. No. 1A-English translation of Court Ex. No 1; Court Ex. 2-affidavit of Murray Stein, Esq. dated Oct. 7, 1976.
10-26-76	Supplemental Record on appeal certified and delivered to the Court of Appeals by Bernard J. Fried (Rossi)
10-28-76	Acknowledgment filed received from the court of appeals for receipt of record as above.

continued.....

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DATE	PROCEEDINGS
11-22-76	Before Mishler, J.- Case Called. Defts & Counsel present. Interpreter present. Trial ordered and begun. Jurors were selected and sworn. Trial continued to 11-23-76 at 9:45 A.M. (RUSSO & CHIAPPE)
11-23-76	Before Mishler, J.- Case Called. Defts. & Counsel present. Trial resumed. Interpreter L. Clancy & A Boyne present. Trial continued to 11-24-76 at 10:00 A.M. (FRANCOIS CHIAPPE & MIGUEL RUSSO)
11/24/76	Before MISHNER, CH. J. -Case called. Defts& Counsel present. Trial resumed. Trial continued to 11/29/76 at 10:00 a.m.(CHIAPPE, RUSSO).
11/29/76	By MISHLER, CH. J.- Order filed on rulings on objections - the 1st two objections are sustained, the remaining objections are under consideration, etc. Objection to evidence concerning the witnesses' reluctance to travel to the U.S. at U.S. Governemtn cost and expense is overruled.(see order).FRANCOISE CHIAPPE)
11-29-76	Before Mishler, J.- Case Called. Defts Chiappe and Russo present. Counsels and interpreter Barron Boyne present. Trial resumed. Motion by deft. Chiappe for a mistrial is denied. Hearing held on a motion to suppress. Hearing and trial continued to 11-30-76 at 10:00 A.M.
11/30/76	Voucher for compensation for expert services filed.(RUSSO).
11-30-76	Before Mishler, J.- Case Called. Defts Chiappe & Russo present. Counsels present. Interpreter Boyne present. Trial resumed. Hearing continued on motion to suppress. Govt. rests in the hearing. Defts rest in the hearing. Hearing concluded. Motion to suppress is denied as it applies to deft. Chiappe. Motion to suppress is granted and denied in part as it applies to the deft. Russo. Trial continued to 12-1-76 at 9:15 A.M. (CHIAPPE & RUSSO)
12-1-76	Before Mishler, J.- Case Called. Defts. Chiappe & Russo and Counsels present. Interpreter Boyne present. Trial resumed. Motion by deft. Chiappe for a mistrial is denied. Govt. rests. Motion by the defts. for a judgment of acquittal is denied. Trial continued to 12-2-76 at 10:00 A.M. (Chiappe & Russo)
12-2-76	2 transcripts filed (one dated July 12, 1976 and one dated July 12, 1976 (afternoon session)
12-2-76	Before Mishler, J.- Case Called. Deft. Chiappe & Russo present with Counsel and Interpreter Boyne. Trial resumed. Motion by defts for a mistrial is denied. Motion by Mr. Gallina to withdraw as counsel for the deft Chiappe denied. Trial continued to 12-6-76 at 10:00 A.M.

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DATE	PROCEEDINGS
2-6-76	Before Mishler, J.- Case Called: Deft Chiappe & Russo present. Counsel and Interpreter Boyne present. Trial resumed. Defts rest. Defts. renew their motion for a judgment of acquittal. Motion denied. Trial continued to 12-7-76 at 10:00 A.M. (CHIAPPE & RUSSO)
12-7-76	Before Mishler, J.- Case Called. Deft. Chiappe & Russo present. Counsel and Interpreter Boyne present. Trial resumed. Motion by Deft. Chiappe for a mistrial is denied. Court charges jury. At 11:50 A.M. the jury retired for deliberation. At 6:10 P.M. the jury returned and asked to suspend for the day and return tomorrow 12-8-76 for further deliberation. Trial continued to 12-8-76 at 9:30 A.M. (CHIAPPE & RUSSO)
12-8-76	By Mishler, J.- Order of Sustenance filed.
12-8-76	By Mishler, J.- Order of Sustenance filed.
12-8-76	By Mishler, Ch J - 3 orders of sustenance filed
12-8-76	Before Mishler, Ch J - case called - defts Chiappe & Russo present with attys - Interpreter Barron Boyne present - trial resumed - at 9:30 am Jury resumed deliberations - at 6:50 PM the jury ret'd and rendered a verdict of guilty as to deft russo. At * 8:55 PM the jury returned and rendered a verdict of guilty as to deft Chappe - Jury polled and jury discharged - trial concluded - all motions reserved to time of sentence.
12-9-76	Voycher for compensation for experts services filed (Albert Barrone-Boyne)
12-17-76	By MISHLER, CH. J. - Order dtd 12-16-76 re photographs used as exhibits received in evidence filed.
12/20/76	Voucher for compensation for expert services filed.
12/22/76	Stenographers transcript dated 11/22/76, 11/23/76, 11/24/76, 11/29/76, 11/30/76, 12/1/76, 12/2/76, 12/6/76, 12/7/76, 12/8/76, 12/20/76 filed.
1-1-77	Before MISHLER, CH. J. - Case called. Deft Chiappe & counsel present. Interpreter present. Hearing ordered & begun on the jurisdictional claim. Adj'd to 1-14-77 at 10 A.M.
1-14-77	Mandate and Opinion filed received from the Court of Appeals affirming the judgment in accordance with the opinion of this Court. (FRANCOIS ROSSI)
1-14-77	Voucher for Compensation for Expert Services filed and forwarded to Washington for payment. (FRACOIS CHIAPPE)
1-14-77	Notice of motion filed (recvd from Chambers for permitting deft Chiappe to call or depose certain witnesses, etc.
1-14-77	Before Mishler, Ch J - case called - ,deft Chiappe & counsel Juris Cederbaum present - Interpreter Albert Barron-Boyne present - hearing continued - motion for continuance of hearing is denied - hearing concluded Decision reserved.

CRIMINAL DOCKET

DATE	PROCEEDINGS
1-25-77	Supplemental record on appeal received from the court of appeals - acknowledgment mailed to court of appeals (ROSSI)
1-25-77	Voucher for compensation for expert services filed and forwarded to Admin. Office for payment (Miguel Russo)
2-1-77	By Mishler, J.- Memorandum of Decision and Order filed denying the deft's. motion to set aside the jury verdict of guilty etc. (FRANCOIS CHIAPPE)
2-7-77	Notice of appeal filed (Chiappe) from order denying motion of 2-1-77 of Ch.Judge Mishler
2/15/77	Notice of motion filed returnable 2/18/77 at 10:00 a.m. for an order arresting judgment and dismissing the indictment. (MIGUEL RUSSO)
2/15/77	Notice of motion filed returnable 2/18/77 at 10:00 a.m. to set aside the verdict of jury and grant him a new trial, (MIGUEL RUSSO)
2/16/77	Letter filed to Judge Mishler from Juris G. Cederbaums, Esq. counsel for deft - Francois Chiappe, dtd 2/16/76, re: claims of errors or exeptions to the probation report submitted by Mr. Allen. (FRANCOIS CHIAPPE)
2/16/77	Notice of motion to adjourn sentence and hearing for new trial filed returnable 2/18/77. (FRANCOIS CHIAPPE).
2.18.77	Before Mishler, J.- Case Called. Sentence adjd. to 3.4.77 on consent. (FRANCOIS CHIAPPE)
2.18.77	Before Mishler, J.- Case Called. Motion for adjournment of the sentence and hearing for New Trial granted until 3.4.77. (FRANCOIS CHIAPPE)
2.18.77	Before Mishler, J.- Case Called. Motion to set aside the verdict and grant the deft. a new trial etc. argued and denied. (MIGUEL RUSSO)
2.18.77	Before Mishler, J.- Case Called. Motion for an order arresting Judgment and dismissing the indictment argued and denied. (RUSSO)
2.18.77	Before Mishler, J.- Case Called. Sentence adjd to 3.4.77 on consent (MIGUEL RUSSO)
3/2/77	Supplemental motion for new trial pursuant to rule 33 filed and forwarded to chambers. (FRANCOIS CHIAPPE).
3/4/77	Before MISHLER, CH. J.- Case called. Deft & Counsel present. Deft sentenced to a term of imprisonment for a period of 20 years and a fine of \$20,000.00. Court advised deft of his right to appeal. Clerk to file notice of appeal without fee. (MIGUEL RUSSO)
4/77	Judgment & commitment filed. Certified copies to Marshals.
4/77	Notice of appeal filed. (MIGUEL RUSSO).
3/4/77	Docket entries and duplicate of Notice of Appeal mailed to the C of A.

PROCEEDINGS

- 77 Before MISHLER, CH.J.- Case called. Deft & Counsel present. Deft sentenced to a term of imprisonment for a period of 20 years and a fine of \$20,000.00. court advised deft of his right to appeal. Bail conditions continued. (FRANCOIS CHIAPPE)
- 77 Judgment & commitment filed. Certified copies to Marshals. (FRANCOIS CHIAPPE)
- 77 Before MISHLER, CH.J - Case called. Motion for new trial argued. Motion denied as indicated on the record. (CHIAPPE).
- 4/77 Notice of appearance filed (CHIAPPE) - Juris Cederbaums, 30 Broad Street Street. New York NY 10004 212 425 1060
- 4/77 Affidavit of Peter R. Schlam in response to Francois Chiappes motion for a new trial filed.
- 12/25/77 Notice of motion for new trial pursuant to Rule 33 filed and forwarded to chambers. (FRANCOIS CHIAPPE)L
- 9-77 Notice of appeal filed (CHIAPPE) Docket entries and duplicate of notice mailed to the court of appeals
- 9/77 Judgment & Commitment returned and filed. Deft delivered to MCC, NY. (RUSSO)
- 9/77 CERTified copy of Judgment & Commitment returned and filed. Deft delivered to MCC, NY (CHIAPPE).
- 9/77 Application filed denying the defts request to remain at MCC until 3/24/77.
- Warden Taylor advises that deft will be held at MCC at least until 3/14/77. (C)
- 11.77 Stenographer's Transcript dated March 4th, 1977 filed. (RUSSO)
- 14.77 Order filed received from the Supreme Court of the United States that the petition for Writ of Certioraria is denied. (ROSSI)
- 28-77 Scheduling order filed received from the c of a that the record on appeal be docketed on or before 4-7-77 (Chiappe & Russo)
- 25/77 Notice of motion and memorandum filed for an order dismissing the indictment and for other relief as the court deems just and proper. (CHIAPPE.)

EJB:TPP:lag
F.#

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

----- X

UNITED STATES OF AMERICA

- against -

FRANCOIS ROSSI, a/k/a "Marcello"
PAUL PAGANACCI
FRANCOIS CHIAPPE
MIGUEL RUSSO
ELIO PAOLO GIGANTE
MARIANO WARDEN
FELICE BONETTI
CESAR MELCHIORE and
JOHN DOE, a/k/a "Dino",

Defendants.

----- X

THE GRAND JURY CHARGES:

From on or about the 1st day of January 1965, and continuously thereafter up to and including the date of the filing of this indictment, within the Eastern District of New York, and elsewhere, FRANCOIS ROSSI, a/k/a "Marcello", PAUL PAGANACCI, FRANCOIS CHIAPPE, MIGUEL RUSSO, ELIO PAOLO GIGANTE, MARIANO WARDEN, FELICE BONETTI, CESAR MELCHIORE, and JOHN DOE, a/k/a "Dino", the defendants, together with Michel Simon Nicoli, named herein as

Cr. No. _____
(21 U. S. C., §173
21 U. S. C., §174
21 U. S. C., §846
21 U. S. C., §963)

73 CR 164

FILED
IN CLERK'S OFFICE
U.S. DISTRICT COURT E.D. N.Y.

★ FEB 15 1973 ★

TIME A.M. _____
P.M. _____

a co-conspirator but not as a defendant, and others known and unknown to the Grand Jury, unlawfully, wilfully and knowingly did combine, conspire, confederate and agree together and with each other to violate prior to May 1, 1971 Sections 173 and 174 of Title 21, United States Code, and on and after May 1, 1971 to violate Sections 812, 841(a)(1), 841(b)(1)(A), 952(a), 960(a)(1) and 960(b)(1) of Title 21, United States Code.

1. It was part of said conspiracy that prior to May 1, 1971 the defendants fraudulently and knowingly would import and bring into the United States large amounts of heroin, a narcotic drug, contrary to law.

2. It was further a part of said conspiracy that prior to May 1, 1971 the defendants unlawfully, wilfully and knowingly would receive, conceal, buy, sell and facilitate the transportation, concealment and sale of large amounts of heroin, a narcotic drug, after the narcotic drug had been imported and brought into the United States, knowing the same to have been imported and brought into the United States contrary to law.

3. It was further a part of said conspiracy that on and after May 1, 1971 the defendants knowingly and intentionally would import large amounts of heroin, a Schedule I narcotic drug, controlled substance, into the United States from places outside thereof.

4. It was further a part of said conspiracy that on and after May 1, 1971 the defendants knowingly and intentionally would distribute and possess with intent to distribute large amounts of heroin, a Schedule I narcotic drug controlled substance.

5. It was further a part of said conspiracy that the defendants would conceal the existence of the conspiracy and would take steps designed to prevent disclosure of their activities.

In furtherance of the conspiracy and to effect the objects thereof, the following overt acts, among others, were committed within the Eastern District of New York and elsewhere:

O V E R T A C T S

1. In or about June 1971, co-conspirator Michel Simon Nicoli met with the defendant ELIO PAOLO GIGANTE in Bogota, Colombia.

2. In or about July 1967, co-conspirator Michel Simon Nicoli met with the defendants FRANCOIS CHIAPPE and FRANCOIS ROSSI, a/k/a "Marcello" in Buenos Aires, Argentina.

3. In or about October 1967, co-conspirator Michel Simon Nicoli received nine (9) kilograms of heroin from the defendant MIGUEL RUSSO in New York, New York.

4. In or about March 1968, co-conspirator Michel Simon Nicoli travelled from Montevideo, Uruguay to John F. Kennedy Airport in Queens, New York.

5. In or about April 1968, co-conspirator Michel Simon Nicolli met with the defendant JOHN DOE, a/k/a "Dino" in Queens, New York.

6. In or about December 1968, co-conspirator Michel Simon Nicolli met with the defendants PAUL PAGANACCI and FRANCOIS ROSSI, a/k/a "Marcello" in Rome, Italy.

7. In or about June 1969, the defendant MARIANO WARDEN travelled from Buenos Aires, Argentina to the United States.

8. In or about April 1970, co-conspirator Michel Simon Nicolli met with the defendants FELICE BONETTI and CESAR MELCHIORE in Buenos Aires, Argentina.

(Title 21, United States Code, Sections 173, 174, 846 and 963.)

A TRUE BILL.

Robert N. Wright
FOREMAN

Robert A. Morse by TTP
ROBERT A. MORSE
United States Attorney
Eastern District of New York

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

-----X

UNITED STATES OF AMERICA, :

-against-

75-CR-264

MIGUEL RUSSO, :

Defendant. :

-----X

United States Courthouse
Brooklyn, New York

July 12, 1976

B e f o r e :

HONORABLE THOMAS C. PLATT, U.S.D.J.

(AFTERNOON SESSION)

HEENE GINSBERG
OFFICIAL COURT REPORTER

Appearances:

DAVID G. TRAGER, ESQ.
United States Attorney
for the Eastern District of New York

BY: PETER SCHLAM, ESQ.
Assistant U.S. Attorney

NANCY ROSNER, ESQ.
Attorney for Defendant

1
2 (Time noted: 2:40 p.m.)

3 THE COURT: Well, lady and gentlemen, you may
4 look at the note.

5 (Document handed to counsel.)

6 THE COURT: I have two alternatives. I can
7 give them an Allen charge, which I suppose we ought to
8 do anyway, but I won't do it unless you both consent,
9 or we can send out for a new panel today or tomorrow
10 morning.

11 MS. ROSNER: It seems most appropriate to give
12 an Allen charge.

13 MR. SCHLAM: I would consent to that.

14 THE COURT: Can you try and start the trial
15 tomorrow?

16 MS. ROSNER: I am perfectly ready.

17 THE COURT: Can you?

18 MR. SCHLAM: I suppose I am ready, your Honor.

19 THE CLERK: Court Exhibit 7, jury note, dead-
20 locked, marked.

21 (So marked.)

22 (Jury entered jury box.)

23 THE COURT: Now, ladies and gentlemen, I
24 realize that you have been working very conscientiously
25 but I do want to give you one final instruction, very

1
2 short instruction and then I will ask you to go back
3 and see if you can -- see what you can do, and if you
4 cannot do anything you should so tell me.

5 But if you can, in the light of this instruction,
6 you should do it.

7 While undoubtedly the verdict of the jury should
8 represent the opinion of each individual juror, it by
9 no means follows that opinions may not be changed by
10 conference in the jury room.

11 The very object of the jury system is to secure
12 unanimity by a comparison of views and arguments among
13 the jurors themselves.

14 It certainly cannot be the law that each juror
15 should not listen to the arguments of his fellow-
16 jurors and distrust his own view and judgment if he
17 finds a majority of the jurors taking a different view
18 of the case.

19 It cannot be that each juror goes into the jury
20 room with a blind determination or that a juror should
21 close his or her eyes to the arguments of men and
22 women equally honest and intelligent.

23 Remember at all times that no juror is expected
24 to give up his or her opinion as to the weight of
25 effective evidence, but remember also that after full

1
2 deliberation and all the considerations of the evidence
3 it is your duty to agree upon a verdict if you can do
4 so without violating your individual judgment and
5 conscience.

6 Take another half-hour or hour or so and see what
7 you can do.

8 (Jury excused.)

9 (The following occurred in the absence of the
10 jury:)

11 MS. ROSNER: Your Honor, I would like to note for
12 the record an objection to your comment to the jury
13 that they should take another half-hour or hour or so
14 because if a juror is holding out, putting a time limit
15 on it is negating -- it seems to me that it defeats the
16 point of the instructions to tell them they have to sit
17 for another half-hour or hour.

18 THE COURT: I thought I prefaced it with remarks
19 that would negate their thinking there was any time
20 limit involved.

21 I just meant they should go back and make one
22 last try.

23 They have been deliberating, after all, for --
24 they started about 11:00 and worked to 6:00 and they
25 started at 10:00 and went 2:30. That's very close to
twelve hours in all in a 5-day case.

1 They say they are hopelessly deadlocked --

2 MS. ROSNER: The point is, if the Allen charge
3 is to be efficacious at all, to tell them to sit for
4 another hour, they certainly won't yield under those
5 circumstances.

6 THE COURT: Well, there are two ways to do it:

7 We can tell them they will stay until water
8 freezes over, which is a long way from now because
9 that would bring us to December --

10 MS. ROSNER: I don't suggest we wait until
11 December but I don't think it helps to tell them that
12 they are going to be sent out in an hour.

13 I wouldn't consent to a mistrial because I
14 don't think that they have been deliberating that long.

15 Often, jurors send in such notes to move off
16 dead center.

17 THE COURT: I will push, if you want me to.
18 I won't let them go in an hour.

19 MS. ROSNER: Okay. Thank you, Judge.

20 THE COURT: I think we ought to start laying
21 some plans for tomorrow.

22 THE CLERK: I spoke to the jury clerk and she
23 has sixty-six jurors downstairs, some of whom were
24 here the last time.

25 Margo is here, you want to talk to her.

1 THE COURT: Yes. We certainly don't want
2 anybody who was up here the last time.

3 Do you know who was up here the last time?

4 JURY CLERK: I don't know but I could inquire
5 before I send them up, if they have been in this
6 courtroom before.

7 THE COURT: You will have to separate these
8 jurors from any who have been returned.

9 JURY CLERK: These could be sent right home.
10 Tomorrow I can have any number but I have some calling
11 on the phone this afternoon for instructions, thirty-
12 nine, and I can tell them to come in, and I have sixty
13 downstairs now.

14 THE COURT: All right. Tomorrow morning.

15 (Recess taken.)

16 (After recess.)

17 (Time noted: 3:00 p.m.)

18 THE CLERK: Court Exhibit 8, jury note, marked.

19 (So marked.)

20 MS. ROSNER: Does your Honor know if it is a
21 verdict?

22 THE COURT: I know it is not.

23 MR. SCHLAM: Your Honor, Ms. Rosner consents
24 to a majority vote by this jury.

25 MS. ROSNER: We will. I will take a

majority verdict. I certainly will.

Are you willing to do it?

MR. SCHLAM: I am willing to do it.

MS. ROSNER: Okay, Judge. I am willing, also.

I don't think this case is worth trying again.

THE COURT: Do you want to take a majority vote?

I have never had that question posed --

MR. SCHLAM: Seven to five.

THE COURT: I don't know whether it is permissible.

Of course, the defendant can waive the constitutional right --

MS. ROSNER: It was done in the Southern District in a case where --

THE COURT: You can waive your right to a jury trial --

MS. ROSNER: Yes --

THE COURT: (Continuing) -- and stipulate if it comes out such-and-such that I would decide --

MS. ROSNER: Right --

THE COURT: (Continuing) -- based on the majority.

MS. ROSNER: Let me just consult with my client so he understands, but my instinct is to do it, Judge.

THE COURT: He would have to do it on the

1 record with him.

2 MR. SCHLAM: If it is lawful, your Honor, we
3 will go for it.

4 THE COURT: I don't see how it can do any wrong.

5 MR. SCHLAM: If he waives it.

6 THE COURT: He can waive his right to a jury
7 trial and be tried by me. I'd be guided by whatever
8 the outcome is.

9 MS. ROSNER: It's certainly a waivable right
10 under any interpretation.

11 MR. SCHLAM: The only thing --

12 THE COURT: He is willing to do it, is he?

13 MS. ROSNER: He says he has suffered enough.
14 He will put the judgment in my hands.

15 THE COURT: Bring him up here.

16 (Defendant approaches bench with Spanish
17 interpreter, Mr. Baron-Boyne.)

18 THE COURT: Translate what I say to him
19 accurately now.

20 Mr. Russo, the jury has sent us now, I think,
21 three notes which indicate they cannot reach a
22 unanimous verdict. They cannot all agree as to the
23 verdict, whichever way it is, which means that a
24 number of them, one or more of them stand for
25 conviction and one or more of them stand for acquittal.

1 Your counsel has stated after the last note,
2 Court's Exhibit 7, that you wish to accept a verdict
3 which is not unanimous.

4 Now, under the Constitution you are entitled to
5 have a unanimous verdict and to have something other
6 than a unanimous verdict determine your guilt or
7 innocence you must waive your right under the
8 Constitution and under any statutes thereunder.

9 Do you understand what I have said thus far?

10 THE DEFENDANT: Yes, your Honor.

11 THE COURT: Mr. Rosner, Rule 23 provides that
12 cases required to be tried by a jury shall be so
13 tried unless the defendant waives a jury trial in
14 writing with the approval of the Court and the
15 consent of the Government.

16 MS. ROSNER: We can prepare a form. We can do
17 the voir dire orally and meanwhile it doesn't hurt
18 for them to continue deliberating. Maybe they will
19 move off dead center.

20 Do we have a softbound copy of the Federal
21 Rules around? I'd like to just look at the rules.

22 THE COURT: Let me get back to Mr. Russo.

23 I think I indicated to you that it would
24 require a waiver on your part of the right to a verdict
25 by a unanimous jury.

1 Do you understand that?

2 THE DEFENDANT: Yes.

3 MS. ROSNER: It has a specific rule --

4 THE COURT: 23(b), what I just read to you.

5 THE DEFENDANT: I understand you.

6 THE INTERPRETER: I repeated it twice because
7 he didn't hear me.

8 THE COURT: Do you understand if the verdict
9 were to come in seven for conviction and five for
10 acquittal or any more for conviction than seven you
11 would be bound by that verdict and you would have no
12 way of going behind that verdict if you waive your
13 right to a jury? Do you understand that?

14 THE DEFENDANT: Yes, sir.

15 THE COURT: In essence, what you would be
16 doing would be saying to this Court that we could take
17 a head count of the jury, and if the majority, if
18 seven or more came in for either conviction or
19 acquittal you would then leave it in this Court's
20 hands to declare the verdict as if there had been no
21 jury and I would act in accordance with that head
22 count. Do you understand that?

23 THE DEFENDANT: Yes, I understand.

24 THE COURT: Now, my question is, have any
25 threats or promises been made to you to induce you to

1 waive your right to a unanimous verdict by the jury?

2 THE DEFENDANT: No, your Honor.

3 THE COURT: Have you been threatened or coerced
4 by anyone into making such a waiver?

5 THE DEFENDANT: No, sir.

6 THE COURT: Are you making such a waiver
7 voluntarily of your own free will and at your own
8 request because you wish to do so and for no other
9 reason?

10 THE DEFENDANT: Yes, your Honor.

11 THE COURT: Have you discussed your waiver
12 fully with your attorney?

13 THE DEFENDANT: I -- no, I decided.

14 THE COURT: You have not discussed your waiver
15 with your attorney?

16 THE DEFENDANT: No.

17 THE COURT: Then I think you had better discuss
18 it fully with your attorney.

19 THE DEFENDANT: I want to ask her.

20 THE COURT: Ms. Rosner, he wants to ask you
21 some questions. He wants to talk to you.

22 (Pause.)

23 MS. ROSNER: He understands.

24 THE COURT: Have you discussed the question of
25 waiver fully with your attorney?

1 THE DEFENDANT: Yes.

2 I will accept the result of the majority.

3 THE COURT: You have fully discussed it with
4 her?

5 THE DEFENDANT: Yes, your Honor, I have.

6 THE COURT: How old are you and what education
7 have you had?

8 THE DEFENDANT: I am 44, fifth grade primary
9 school.

10 THE COURT: Have you recently been hospitalized
11 or under care of a physician or a psychiatrist?

12 THE DEFENDANT: No, sir.

13 THE COURT: Do you fully understand what you
14 are doing here?

15 THE DEFENDANT: Yes, your Honor.

16 THE COURT: Do you believe he does?

17 MS. ROSNER: Yes, Judge.

18 THE COURT: Having been advised as to your
19 rights as to a unanimous verdict by a jury of twelve,
20 I will accept your waiver thereof and your consent to a
21 majority verdict by this jury whichever way it comes
22 out.

23 I will, however, in an excess of caution, require
24 that the consent and waiver be in writing.

25 MR. SCHLAM: Also, I think we have to decide what

1 the mechanics of this are going to be.

2 MS. ROSNER: How shall we take the count? Shall
3 we do it in the jury room or poll them in court?

4 THE COURT: I think we will poll them in open
5 court.

6 MS. ROSNER: If we poll them here in open court
7 -- well, it could be a six to six jury which, I guess,
8 is simply a mistrial.

9 THE COURT: No doubt about that.

10 MS. ROSNER: Secondly, Judge, suppose there are
11 people who are not committed to a position fluctuating
12 back and forth. If they don't know they are being
13 polled --

14 THE COURT: We could tell them to vote with the
15 Foreman one way or the other and then call them in and
16 poll them after full deliberation.

17 MS. ROSNER: I think we should tell them we are
18 going to take a majority vote.

19 MR. SCHLAM: But I think first we have to get
20 a written waiver prepared.

21 MS. ROSNER: Aren't there jury trial waiver
22 forms? Frankly, I think the waiver in writing is
23 intended to be executed pretrial.

24 THE COURT: No, no. The cases seem to say you
25 can waive it not only pretrial but during the trial as

1 well.

2 MS. ROSNER: May the defendant sit down, Judge?

3 THE COURT: Yes, he may sit.

4 MR. SCHLAM: Would it be all right if I just had
5 two minutes to go up and make sure Mr. Traeger agrees
6 with me?

7 THE COURT: Yes, and maybe you want to look at
8 this and get somebody to type it up or write it better.

9 (Document handed to counsel.)

10 MS. ROSNER: Fine, your Honor.

11 THE COURT: Court Exhibit J.

12 (So marked.)

13 THE COURT: Let me read you something my right
14 arms have found, Ms. Rosner.

15 MS. ROSNER: We are missing a prosecutor, Judge.

16 THE COURT: Let me read it to you, anyway.

17 MS. ROSNER: Okay.

18 THE COURT: "The verdict in a federal criminal
19 case" -- this is Moore's Federal Practice, 8A --
20 "must be unanimous.

21 "See Apodaca v. Oregon (1972 U.S., 92 Supreme
22 Court 1628, 32 LE Ed 2d 184.

23 "This requirement is jurisdictional and may not
24 be waived, despite the fact that waiver of the
25 requirement of a jury of twelve is permitted.

"The rule, referred to above, that makes unanimity constitutionally necessary in federal criminal jury trials, but not in state trials, was arrived at by a kind of medieval appellate jurisprudence that no layman, and probably few lawyers, can appreciate. Four Justices of the Supreme Court concurred in a 'majority' opinion which, following the lead of Williams v. Florida found that unanimity was not an indispensable ingredient of the Sixth Amendment jury-trial right. Four other Justices, in dissenting, felt that it is an indispensable ingredient, making no distinction between federal and state trials, as indeed should be the result consistent with the Duncan case. The swing vote of Justice Powell joined the majority to the extent he believed that unanimity is not required in state trials, and the minority in that he believed it was still a necessary element in federal trials."

MS. ROSNER: What case is that, your Honor?

THE COURT: Apodaca v. Oregon.

MS. ROSNER: I'd like to look at the opinion.

THE COURT: It's unbelievable.

MS. ROSNER: May we look at the opinion while the jury is out deliberating?

THE COURT: 92 - Supreme Court 1628.

1 "No federal case has been cited and none can
2 be found by independent research that holds or even
3 remotely suggests that it may be waived...to sustain
4 the validity of a verdict by less than all of the
5 jurors is to destroy this test of proof for there
6 cannot be a verdict supported by proof beyond a
7 reasonable doubt if one or more jurors remain
8 reasonably in doubt as to guilt. It would be a
9 contradiction in terms. We are of the view that the
10 right to a unanimous verdict cannot under any circum-
11 stances be waived, that it is of the very essence of
12 our traditional concept of due process in criminal
13 cases, and that the verdict in this case is a nullity
14 because it is not the unanimous verdict of the jury as
15 to guilt."

16 MS. ROSNER: That was over a defendant's
17 objection.

18 THE COURT: I don't think it makes any
19 difference. It was obviously with the consent of the
20 defendant and it could not be done otherwise.

21 There are about ten different opinions on this,
22 Ms. Rosner, and you are welcome to them. However,
23 Moore's is clear.

24 Call Mr. Schlam.

25 (Pause.)

1 THE COURT: Mr. Schlam, we have looked up the
2 law and as far as we can see it cannot be waived.

3 MS. ROSNER: I don't agree.

4 Apodaca seems to hold that the requirement of
5 unanimity wasn't part of the right to the jury trial
6 as applied to state courts and there is no authority
7 on the subject regarding federal courts.

8 THE COURT: But the dissenting opinion states
9 that over and over again it has been held --

10 MS. ROSNER: That is the dissent. The case
11 doesn't stand for that.

12 THE COURT: No, but it cites all the Supreme
13 Court cases.

14 Apparently, four agreed that in federal court
15 unanimity was required while four agreed in state
16 court it was not.

17 MS. ROSNER: I have a proposal. May I speak to
18 Mr. Schlam for a moment? Perhaps we can resolve the
19 problem -- indefatigable in our efforts to resolve the
20 issue.

21 (Pause.)

22 MR. SCHLAM: May we have five more minutes to
23 see if we can work it out?

24 THE COURT: I don't see how you can.

25 MS. ROSNER: I seems to be a case in the

Second Circuit where the parties wished to do this and they dismissed the minority jurors, therefore leaving the jury which was unanimous.

THE COURT: That was overruled.

MS. ROSNER: I don't believe so. It is a question of economy of time for the Court and the parties involved.

THE COURT: I agree with that but it is not economy for the Court when you take it to the United States Supreme Court --

MS. ROSNER: That is not what anyone is looking for.

THE COURT: Ms. Rosner, you get fired tomorrow and another attorney takes it up to the Supreme Court.

MS. ROSNER: I am not making the oral waiver and signing the paper.

I'd like to look at the Second Circuit Court to see what was said. They obviously wanted to devise a situation where the jury was able to give a unanimous verdict with less than twelve, and that is what we are saying.

THE COURT: As I read it, you have to get a unanimous verdict.

That case was in 1971.

MS. ROSNER: Does your Honor know the name of

1 the case?

2 THE COURT: I don't think that case is any
3 longer the law.

4 THE CLERK: 667 F. 2d.

5 (Pause.)

6 THE COURT: Did you read Vega?

7 MS. ROSNER: Yes.

8 (Pause.)

9 MS. ROSNER: If we sent a note to the jury for
10 them -- without indicating which way they are --
11 whether for guilty or not guilty -- to give us a
12 count and then dismissed whoever was in the minority,
13 the defendant can consent to less than twelve being on
14 his jury. That much is clear.

15 We can then excuse those who indicate the
16 minority and relieve ourselves of a unanimous jury.

17 THE COURT: Judge Neaher, for whom I have the
18 gre test respect, decided this before Apodaca --

19 MS. ROSNER: But we are talking apples and
20 oranges.

21 We will have a unanimous verdict by less than
22 twelve.

23 We will have a jury that comes in and says,
24 we are unanimous in our verdict but it is just a
25 jury of less than twelve people.

We will have a unanimous verdict. We will
excuse those who are in the minority.

That is what was done in Vega and it was held
proper.

The only issue there was whether or not his
waiver was coerced.

THE COURT: Let me talk to the Government for a
minute.

Are you fully aware of the trap you may be
getting into? If you consent to the procedure and it
backfires, you have a double-jeopardy problem.

(continued next page)

1 MR. SCHLAM: I think under the circumstances
2 with the consent of the defendant --

3 THE COURT: It may be a heads-you-win, tails-
4 you-lose. You may not even be able to try it again
5 even if you lose. You may have a double-jeopardy
6 question.

7 MS. ROSNER: He can waive double-jeopardy.
8 He can do that on the record right now, if there is
9 any question about it. I am not attempting to gain
10 unfair advantage.

11 THE COURT: It's up to you. If everybody want:
12 to take a gamble I couldn't care less. But I don't
13 think -- given this case by the United States Supreme
14 Court following what the Second Circuit says -- I
15 don't think it is permissible.

16 MR. SCHLAM: As a preliminary, perhaps we can
17 ask the jury, without telling them anything, which way
18 the case is going, which way they stand.

19 THE COURT: You are going to get in the exact
20 same trap.

21 My opinion is the best thing to do under the
22 circumstances is call them in and if still hung call a
23 mistrial and re-try it.

24 MS. ROSNER: Are you leaving open the option?

25 THE COURT: I : : foreclose the Government

1 and defendant from proceeding independently. If you
2 want to do it, go ahead. Just tell me how you want to
3 do it. But I think you are walking into a trap.

4 MS. ROSNER: Can we have a moment, Judge?

5 (Pause.)

6 MS. ROSNER: We still feel that it may be
7 possible to resolve the issue with a jury of less than
8 twelve but in order to decide whether that is fair to
9 both sides we would like the Court to inquire -- and
10 the defendant specifically makes this request -- how
11 they stand, not whether they are for conviction or
12 acquittal but merely what their numerical count is.
13 If it is 6 to 6 or 7 to 5 both sides might reassess
14 the wisdom of the decision and if it is of great
15 disparity we can consider that.

16 THE COURT: If the Court asks how they stand
17 and gets a numerical count one way or the other the
18 Court cannot send them back. It is an automatic
19 mistrial. That's a Washington case.

20 MS. ROSNER: I don't know of such a case.
21 Perhaps without my consent --

22 THE COURT: We had it involving Miss Marsha
23 Katz with the Strike Force --

24 MS. ROSNER: That was with the consent of the
25 defendant.

1 THE COURT: Yes.

2 It was 11 to 1.

3 We found a case and I declared a hung jury and
4 then right after that the jury came in with a
5 unanimous verdict for the Government.

6 You see, I have been down this road. This is a
7 very tricky business. I have been down this road.

8 By the way, gentlemen of the press, when I said
9 I couldn't care less I meant I couldn't care less about
10 how they resolved the problem. I could care less.
11 I don't want to sit on this case again and again and
12 have it brought all the way back from the Supreme
13 Court.

14 MR. SCHLAM: Would your Clerk be good enough to
15 give us the citation to check that case out?

16 THE COURT: What makes you think it's going to
17 make any difference?

18 Judge Neaher in this case decided this before
19 the United States Supreme Court said a unanimous
20 verdict is necessary.

21 I think what you are doing is attempting an
22 end run around the Supreme Court's latest announcement
23 on the subject. I don't know how else to describe it.

24 MR. SCHLAM: Your Honor, for the record, I'd
25 like to state that all discussions with Ms. Rosner

1 and after listening to the opinion of the Court we are
2 unable to enter into any agreement such as the one
3 previously discussed in this case.

4 THE COURT: Well, the Court, assuming that they
5 are still of the same view when we call them in, will
6 declare a mistrial.

7 MS. ROSNER: I will object to the declaration
8 of a mistrial this early in the day.

9 When you Allenized the jury you told them to
10 sit for only half an hour and the jury got the very
11 clear implication -- and exactly as I predicted -- one-
12 half hour later they came back and said they could not
13 arrive at a verdict, and your Honor indicated we were
14 going to ask them to stay for awhile.

15 I think the jury should be held at least until
16 after ten this evening. I have no engagements tonight
17 and I don't think the prosecutor has.

18 I think the jury should be Allenized with some
19 meaning. What you gave them after took the guts out
20 of it and I will not consent to a declaration of a
21 mistrial.

22 THE COURT: Then at five o'clock we will bring
23 them back tomorrow.

24 MS. ROSNER: I am perfectly willing to do that.

25 THE COURT: I will re-read the Allen charge

1 tomorrow morning.

2 MR. SCHLAM: I don't know if the jury thinks
3 they are still supposed to deliberate.

4 THE COURT: I will call them in right now and
5 tell them to continue to deliberate.

6 (Time noted: 4:30 p.m.)

7 (Jury entered jury box.)

8 THE COURT: You are probably wondering what
9 happened since you last sent us your last note at
10 about 3:00 o'clock or 3:15 and it is now 4:30.

11 Well, we have been discussing a number of
12 legal problems.

13 The Court wishes you to continue your
14 deliberations.

15 If you wish me to, I will re-read to you the
16 supplemental charge I read to you when we were last
17 together, but we do wish you to continue your
18 deliberations and I suggest that you do so.

19 (Jury excused.)

20 (Recess taken.)

21 (After recess.)

22 THE COURT: Now look, when all is said and done,
23 this jury deliberated almost as long as this case took
24 to try.

25 MR. SCHLAM: I don't think there is any purpose

1 to be served by continuing with this. That is my
2 opinion.

3 THE COURT: You think I ought to declare a
4 mistrial?

5 MR. SCHLAM: I am hesitant to say because I
6 don't know what the legal consequences of that
7 statement are.

8 THE COURT: You do not object to it?

9 MR. SCHLAM: Correct, your Honor.

10 THE COURT: I don't think we are going to get
11 anywhere.

12 MS. ROSNER: I cannot consent yet. I'd like
13 the jurors to cool their heels and come back tomorrow
14 and after an hour -- I am not trying to maintain a
15 position at judicial cost.

16 How about if we have this panel in at 9:00 and
17 if they don't reach a verdict by 10:00, declare a
18 mistrial? I would consent at 10:00 A.M. if they have
19 a chance to think about it overnight and deliberate
20 for one more hour.

21 THE COURT: They have deliberated for two days.

22 MS. ROSNER: They were out a substantial portion
23 of two days but I would like to let them think about
24 it overnight.

25 MR. SCHLAM: They had the whole weekend to

1 think about it.

2 MS. ROSNER: What harm can come from letting
3 them come in for one more hour?

4 THE COURT: I am going to declare a mistrial.

5 MS. ROSNER: We would not delay the proceedings
6 if we bring them in for one hour and at that point
7 I would consent to the declaration of a mistrial
8 because then I would really, really feel it is futile
9 to go on.

10 THE COURT: I think it is futile now. I think
11 it is absolutely futile.

12 They wrote a note saying they were hopelessly
13 deadlocked Friday afternoon at 5:00 o'clock. They had
14 a full day and they are still hopelessly deadlocked.

15 MS. ROSNER: Their second deadlocked note was
16 at 2:30 when the Court gave an Allen charge but as I
17 said, you gave them a period of time to look forward
18 to so they got the feeling no one was going to tell
19 them to go back in -- just as I stated. It is now
20 five o'clock. That was only two and a half hours ago.

21 If you don't want to sit any longer tonight
22 bring them back for an hour in the morning so they
23 don't get the feeling if they remain adamant and will
24 not consider each other's views --

25 THE COURT: Did you read the last note?

1 MS. ROSNER: I did.

2 THE COURT: That was sent in about a quarter to
3 three, three o'clock, as I recall; two and a quarter
4 hours ago.

5 MS. ROSNER: What can it hurt, your Honor, to
6 bring them back?

7 THE COURT: No, I am going to let them go.

8 MS. ROSNER: Well, I want the record to note my
9 objection.

10 THE COURT: Yes, I am sure it does.

11 MS. ROSNER: I would like the jury to be polled
12 as to how they stand and I think the Government would
13 join in the application once the mistrial is declared.

14 MR. SCHLAM: Yes, your Honor.

15 THE COURT: Okay.

16 (Time noted: 5:00 o'clock.)

17 (Jury entered jury box.)

18 THE COURT: Mr. Bing, you deliberated a whole
19 other day and it is now five o'clock.

20 In your opinion, is there any hope of reaching
21 a verdict based on any further deliberations?

22 JUROR NO. 1: I would think, your Honor, it
23 would be a question of the time element involved.

24 THE COURT: If you come back tomorrow --

25 JUROR NO. 1: I'd be speculating but I'd say

1 the chances are slim.

2 THE COURT: I must be guided by your view.

3 I will bring you back tomorrow and you can
4 resume deliberations if you think there is any basis
5 for it.

6 JUROR NO. 1: At this time I think there is no
7 sound basis to bring us back in on this.

8 THE COURT: I read your last note which said
9 each juror had conscientiously considered the views of
10 each other juror.

11 Do you feel that has been done?

12 JUROR NO. 1: Yes, I do.

13 THE COURT: You are still hopelessly deadlocked?

14 JUROR NO. 1: Yes.

15 THE COURT: Under the circumstances, I think I
16 will declare a mistrial and so the Court declares a
17 mistrial and the -- which will mean, as you probably
18 gather, the case will have to be re-tried before
19 another jury.

20 Both sides, in the light of what transpired,
21 have requested the Court get from you, Mr. Bing,
22 roughly how the jury stands. You can do that now
23 because a mistrial has been declared.

24 Do you have a latest tally?

25 JUROR NO. 1: The latest tally, prior to going

1 back into session was 8 for a not guilty and 4 for a
2 guilty.

3 THE COURT: You are discharged with the thanks
4 of the Court and we certainly appreciate the efforts
5 you have put into this case.

6 It is one of those things that sometimes jurors
7 cannot agree and it doesn't often happen but it does
8 happen from time to time.

9 I think you still have further jury service to
10 attend to. You should be careful not to discuss with
11 any other jurors on the panel downstairs, anything
12 that is going on here or anything as to how the jury
13 stood.

14 I sent word to the Jury Clerk that you are not
15 to be recalled tomorrow. When you go out, make sure
16 that is not done.

17 If you happen by chance to see any other jurors
18 on the panel, do not discuss any aspect of this case
19 because one slight word achieves the same result in the
20 re-trial of a case.

21 Be careful to keep your own counsel in this case.

22 Good night.

23 (Jury excused.)

24 MR. SCHLAM: Your Honor, in light of the state-
25 ment by the jury we would respectfully request a little

1 bit of time in order to see if there is anything further
2 that we may be able to present in a re-trial in support
3 of the charges against this defendant.

4 As your Honor may know, the trial in this case
5 came on quickly after the defendant came back from
6 Argentina.

7 I believe the fact of the matter is he was
8 only returned here at the end of May which means that
9 far less than the ninety-day period has elapsed.

10 This is an important case to us and we request
11 that we be given time consistent with the Speedy Trial
12 rules in order to see whether evidence can be
13 developed and presented which would strengthen the
14 Government's case.

15 THE COURT: This is Judge Mishler's case. I
16 took the case from him because he is involved in that
17 multi-defendant case of some length.

18 I talked with him today before I declared the
19 mistrial. I asked him about a re-trial. His state-
20 ment was, send the case back to me and let me handle
21 it.

22 So what I will ask you to do, if you both don't
23 mind, is to make that application to him tomorrow
24 morning at 9:30. Let him make the decision. If he
25 sends it back to me at ten o'clock I will be

1
2 available to re-try it.

3 MS. ROSNER: Thank you.

4 As I told your Honor, I have made reservations
5 to leave the country on the 22nd of this month and I
6 have trial commitments until November. Thereafter, I
7 am committed until November.

8 MR. SCHLAM: Thank you very much, and I want
9 to say that I enjoyed very much trying this case
10 before you.

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2 MICHEL NICOLI , having been previously sworn
3 through an interpreter, resumed the witness stand and testi-
4 fied as follows through an interpreter:

5 DIRECT EXAMINATION

6 BY MR. SCHLAM:

7 Q Mr. Nicoli, after December 1967, when the
8 heroin was seized in Canada, did you have discussions con-
9 cerning another heroin trip?

10 A Yes.

11 Q With whom did you have those discussions?

12 A Francois Rossi, Francois Chiappe.

13 Q Where?

14 A In Buenos Aires.

15 Q Approximately when?

16 A Approximately in the month of January 1968.

17 Q Would you tell us, please, what the discussion among
18 the three of you was at that time?

19 A We decided to make another trip with 3 kilos
20 of heroin. And then we decided we would go talk to Miguel
21 Russo.

22 Q Did you talk to Miguel Russo?

23 A Yes, I, myself, went.

24 Q And where did you speak to him?

25 A In Buenos Aires.

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Q Tell us, please, what that conversation was.

A I asked Miguel Russo if he knew anybody who could transport 3 kilos of heroin from Buenos Aires to the United States. He said he did and he introduced me to the pilot of a cargo airplane, a man by the name of Orlando.

Q What discussions were held during the time that you were introduced to this pilot Orlando by Mr. Russo?

A I asked the pilot if he would be able to transport the three kilos of heroin. He said he could. I arranged to meet the pilot at the McAllister Hotel in Miami on a given date.

Q Now, thereafter did you obtain 3 kilograms of heroin?

A Yes.

Q Where was it that you received the 3 kilograms of heroin?

A In Buenos Aires.

Q And tell us, please, what happened with respect to those 3 kilograms of heroin.

A I gave the 3 kilos of heroin to Miguel Russo.

Q And when you gave the 3 kilograms to Miguel Russo, did you speak to him at that time?

A Yes.

Q And tell us what was said between you and

3 1 Miguel Russo when you gave Russo the 3 kilograms of heroin?

2 A I asked Miguel Russo to deliver the 3 kilos of
3 heroin to the pilot, and I told him to tell the pilot that
4 I would be in Miami on a given date.
5

6 Q What did Miguel Russo say in response to what
7 you were telling him?

8 A He agreed.

9 Q Thereafter, did you leave Buenos Aires, Mr.
10 Nicoli?

11 A Yes.

12 Q And where did you go?

13 A To Miami.

14 Q And tell us, please, what passport you used to
15 make this trip.

16 A An Argentinian passport in the name of Enrico
17 Goldman.

18 Q Approximately when was it that you left Buenos
19 Aires for this trip?

20 A Approximately on the 14th of February, 1968.

21 THE CLERK: Document marked Government's
22 Exhibit 54 for identification.

23 MR. SCHLAM: I offer Exhibit 54 into evidence.

24 THE COURT: Show it to Counsel.

25 (Shown to Counsel.)

MS. ROSSNER: I have no objection.

Nicoli-direct

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THE COURT: Let it be marked.

THE CLERK: So marked 54 in evidence.

Q Mr. Nicoli, would you look at page 3 of what has been marked as Exhibit 54 in evidence and tell us if you recognize it?

(Exhibit shown to witness.)

A Yes, it is the Immigration document for the entry into the United States.

Q Do you recognize any of the handwriting on that document?

A Yes, it is my handwriting.

MR. SCHLAM: Your Honor, if I may, I would like to read this document to the jury.

THE COURT: You may.

MR. SCHLAM: Family name, Goldman; first name, Abraham; middle name, Enrico; nationality, Argentina; passport No. 35916; United States address, Dilido Hotel, Miami, Florida; airline and flight vessel of arrival, Vatic Flight 800; passenger boarded at Rio de Janeiro; permanent address, Calle Mirigoyev, 1500 Provincia of Buenos Aires; birth date, April 26, 1930, -- birth place, Buenos Aires; and the Immigration stamp reflects U.S. Immigration Miami, Florida; entered February 14, 1968.

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5 1
2 Q Mr. Nicoli, the Immigration form reflected
3 that you boarded the flight that you took to New York in
4 Rio de Janeiro, Brzil, is that correct?

5 A Rio to to Miami?

6 Q Excuse me, would you tell the ladies and
7 gentlemen of the jury, please, what was your itinerary from
8 Buenos Aires to Miami.

9 A From Buenos Aires I went to Rio de Janeiro
10 with my passport for Miguel Dossantos.

11 Q Continue, please.

12 A In Rio de Janeiro I dropped the Miguel
13 Dossantos passport and took the Enrico Goldman passport in
14 order to go to Miami.

15 Q From whom did you receive the Abraham Enrico
16 Goldman passport?

17 A From Miguel Russo.

18 Q When you arrived in Miami, tell us, please,
19 what happened?

20 A In Miami I was arrested.

21 Q Go ahead.

22 A I was searched, I was kept for two hours and
23 after that I went to the Dilido Hotel.

24 Q When you say you were arrested, Mr. Nicoli,
25 where was it that you were arrested?

Nicoli-direct

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Q Mr. Nicoli, the Immigration form reflected that you boarded the flight that you took to New York in Rio de Janeiro, Brazil, is that correct?

A Rio to to Miami?

Q Excuse me, would you tell the ladies and gentlemen of the jury, please, what was your itinerary from Buenos Aires to Miami.

A From Buenos Aires I went to Rio de Janeiro with my passport for Miguel Dossantos.

Q Continue, please.

A In Rio de Janeiro I dropped the Miguel Dossantos passport and took the Enrico Goldman passport in order to go to Miami.

Q From whom did you receive the Abraham Enrico Goldman passport?

A From Miguel Russo.

Q When you arrived in Miami, tell us, please, what happened?

A In Miami I was arrested.

Q Go ahead.

A I was searched, I was kept for two hours and after that I went to the Dilido Hotel.

Q When you say you were arrested, Mr. Nicoli, where was it that you were arrested?

6 1

2 A At the Miami airport.

3 Q For how long were you in custody on this
4 occasion?

5 A For about two hours.

6 Q You were questioned during those two hours, am
7 I correct?

8 A Yes.

9 Q And then released?

10 A Yes.

11 Q And tell us, please, what happened after you
12 were released from the airport.13 A I went to the Dilido Hotel, I took a room, in
14 the room I left my suitcases and after that I went to the
15 Miami airport and I took an airplane for New York.16 Q Going back for just a second to the time of
17 your entry to the United States at Miami, did you have suit-
18 cases with you on this occasion?

19 A Yes.

20 Q Were those suitcases searched in those two
21 hours that you told us about?

22 A Yes.

23 Q Did you have any narcotics in the suitcases?

24 A No.

25 Q Was your person searched?

7 1

2 A Yes.

3 Q Did you have any narcotics on your person?

4 A No.

5 Q So after checking into the Dilido Hotel, you
6 went to the Miami airport again, am I correct?

7 A Yes.

8 Q What happened then?

9 A I took an airplane to go to New York. In New
10 York I went to the apartment of Florenzo Gonzales in the area
11 of the Bronx, I met with Florenzo Gonzales, I explained to
12 Florenzo what happened in Miami, and I asked Florenzo if he
13 knew anybody who could go down to Miami to the McAllister
14 Hotel.

15 Q For what purpose?

16 A In order to pick up the 3 kilos of heroin that
17 the pilot was supposed to bring in.

18 Q What did Florenzo Gonzales say?

19 A Florenzo Gonzales made a phone call to a
20 friend of his by the name of Papito.

21 Q Go ahead.

22 A And then Papito came over to the apartment,
23 Florenzo Gonzales asked him if he could send anybody down to
24 Miami to pick up the 3 kilos of heroin. Papito in fact sent
25 somebody down to Miami, and then on the following day, this

1
2 somebody came to the apartment of Florenzo Gonzales with the
3 3 kilos of heroin and then Florenzo Gonzales gave me approx-
4 imately \$28,000. He gave me \$28,000 because he had had to pay
5 the man who had gone down to Miami to pick up the 3 kilos.
6 Thereafter I left for Buenos Aires with the money.

7 MR. SCHLAM: May I have this marked, please?

8 THE CLERK: Photograph marked Government's
9 Exhibit 55 for identification.

10 Q Would you look at what has been marked as
11 Exhibit 55 for identification and tell us if you recognize
12 it?

13 (Shown to witness.)

14 A Yes, this is Papito.

15 Q Do you know the name Roberto Martinez?

16 A Presently I do.

17 Q Right. Is the individual in that picture, the
18 person you now know to be named Roberto Martinez?

19 A Yes.

20 Q But at the time you met him, in February of
21 1968, you did not know his true name, am I correct?

22 A No.

23 Q You only knew him by Papito?

24 A Yes.

25 MR. SCHLAM: Your Honor, I offer Exhibit 55

into evidence.

THE COURT: Show it to Counsel.

(Shown to Counsel.)

MS. ROSSNER: No objection.

MR GALLINA: No objection.

THE COURT: Let it be marked.

THE CLERK: Government's 55 marked in evidence.

MR. SCHLAM: If I may, I would like to read from Exhibit 54 which indicates that on February the 16th, 1968, Abraham Enrico Goldman departed New York via Argentine Airlines, flight 321, a non-stop flight to Buenos Aires.

THE COURT: What date was that?

MR. SCHLAM: February 16, 1968.

Q Mr. Nicolli, when you returned to Buenos Aires after this trip, whom did you meet?

MR. GALLINA: May I see it?

(Shown to Counsel.)

A Francois Rossi, Francois Chiappe.

Q And where was that?

A In Buenos Aires.

Q Tell us, please, what was discussed among you on that occasion?

A I told them what happened in Miami and in New

2 York, after that we split the money in four shares.

3 Q And who received the four shares?

4 A Pierre Poggi, Francois Chiappe, Francois Possi
5 and myself.

6 Q Now, was Mr. Russo entitled to money for his
7 efforts in connection with this trip?

8 MS. ROSSNER: Objection as to form.

9 MR. SCHLAM: I will rephrase it, your Honor.

10 THE COURT: Rephrase it.

11 Q Did Mr. Russo receive any money for what he
12 had done in connection with this trip?

13 A A small amount.

14 Q Now, Mr. Nicoli, after this trip, did you con-
15 tinue to engage in the narcotics traffic?

16 A Yes.

17 Q And is it true that you continued to engage in
18 the narcotics traffic up until your arrest in November of
19 197 -- October of 1972 in Brazil?

20 A Yes.

21 Q Is it also true that your activities after
22 February, 1968 in connection with the narcotics traffic in-
23 cluded your association in that traffic with many other per-
24 sons?

25 A Yes.

1 MRS. ROSNER: Mr. Schlam indicates there was
2 documentary proofs for the I94 forms for the trip
3 Mr. Russo made. This case has been tried twice and
4 the gauntlet has been thrown to the Government on each
5 occasion to demonstrate by competent, expert testimony
6 that any piece of handwriting on any of those
7 documents was in fact the defendant Miguel Russo's
8 handwriting, and they have not risen to the case on
9 either trial. So the reliance on documentation seems
10 to me something less than persuasive, and under all
11 the records, your Honor, I think the motion is made
12 out as a matter of prima facie case, and we're either
13 entitled to have the Government rebuttal, if they
14 rebut the issue, or to have the matter granted as a
15 matter of law.

16 THE COURT: I think the substantial
17 documentary proof as submitted is limited to the issue
18 of fact, and it has little, if anything to do with the
19 trial, the type of evidence that would in my opinion
20 have no effect on the results in this case. The motion
21 for a new trial is denied.

22 The other issue that you raise is on double
23 jeopardy, is what I turn my attention to, and I find
24 very interesting. I think you can make a respectable
25 argument in the Court of Appeals, and I say that very

1 seriously. I had trouble with this.

2 MS. ROSNER: It's an issue that's never been
3 squarely litigated, as far as I know, your Honor.

4 THE COURT: I had trouble with it. I think
5 it's distinguished from Vega. I read Vega, and
6 Judge McMahon in that case found that one juror,
7 juror 1 said, "I can't agree with the other eleven and
8 you'd better call a mistrial," and Judge McMahon
9 excused the juror and then asked if they wanted a
10 unanimous verdict of eleven, and they agreed, and so
11 they consented to dismiss the juror who dissented
12 without knowing what the other eleven were.

13 You analogize, and I think that is a strong
14 argument, and I think the analogy, like most, are
15 impressive. I think the difficulty here is in that
16 the Government did not consent to a verdict of less
17 than twelve. They came pretty close. Judge Platt
18 interrupted the procedure at that point, and asked
19 that it be reduced to writing, and the Government had
20 a chance of heart, and decided it wanted a unanimous
21 verdict.

22 Now, you say that the Government is called upon
23 to give a reason for insisting on a unanimous verdict
24 of twelve.

25 MS. ROSNER: No, your Honor.

1 THE COURT: Well, I just want to finish my
2 argument here. I thought this is what you were saying.
3 I find authority that supports the Government's
4 position that they do not have to give a reason. I
5 can understand an argument to be made to the Congress
6 to change the rule, which would permit the parties to
7 accept a verdict of less than a unanimous verdict, if
8 they wish, but since the law is to the contrary, and
9 that in criminal cases we must have the unanimous
10 verdict, I don't like to employ gimmickry to avoid it,
11 and to my mind, that's what was being done.

12 You're saying, let's find out how many were
13 for and how many against, five against, we'll excuse
14 those that were against and now we'll take a verdict
15 of seven. That's unanimous. I don't think the
16 Government went that far, but even if they did, I
17 think I should criticize that type of procedure.
18 Let's take a majority verdict, or let's say you
19 require a unanimous verdict. I say, I think the
20 Vega case is an extreme case where the juror
21 identified himself, where it was clear without the
22 entry of the Court as to how the jury sided, and so
23 we're not invalidating the secret deliberations of
24 the Court -- of the jury, rather, inquiring as to
25 the deliberative process, and so it's quite open and

1 I suppose that kind of procedure is tolerable. But
2 I can see where Judge Platt found the other a little
3 distasteful, and was reluctant and he came to a
4 decision, the Government decided it did not want to
5 go through with it.

6 MS. ROSNER: May I respond, your Honor?

7 THE COURT: Yes.

8 MS. ROSNER: Your Honor misconceives the
9 factual contention, and I'm sure it's because of lack
10 of clarity in preparation rather than --

11 THE COURT: I think your briefs are, as a
12 matter of fact, your briefs were very clear. You tied
13 it into the record and it was a very fine explanation
14 that you offered of just what occurred.

15 MS. ROSNER: My point is this, your Honor:
16 Our contention is not that the Government must give
17 reasons for failing to consent to less than a
18 unanimous verdict, but that under the circumstances
19 where the results would be the extreme prejudice of
20 a second trial, the Government has no right to demand
21 a unanimous verdict. The right to a jury trial has
22 many sub-facets; there is a question of trial to the
23 Court and jury, initially, which under Rule 23, the
24 Government clearly has the right to participate in,
25 to the extent of negating a judge trial, not always

1 but under most circumstances, but to assume under the
2 right to jury trial or the right of unanimity and the
3 right to a full majority, we contend that the
4 Government under the circumstances, where the result
5 is to prejudice the defendant by requiring a second
6 trial, and where the defendant is willing, at his
7 peril, to take the majority verdict, the Government has
8 no right to frustrate the defendant's right to
9 terminate the process at that point.

10 We're not contesting the failure to give a
11 statement of reasons on the record where the result is
12 what it is here, that is, undeniably a second trial,
13 the Government has no right to withhold its consent.

14 THE COURT: I think you cite Singer for that,
15 don't you?

16 MS. ROSNER: Correct.

17 THE COURT: Singer is just to the contrary.
18 I read just Earl Warren's decision in Singer. It
19 doesn't say that at all.

20 MS. ROSNER: The result is to the contrary, but
21 many cases are cited for the dictum, and that indicates
22 consent is not always, is not always and under all
23 circumstances necessary, and we think that is one of
24 those cases, where it is not necessary.

25 THE COURT: Mrs. Rosner, you may be establishing

1 a new concept or it may be a developing concept in cur
2 law. I don't know at which point the Government must
3 accede to the Defendant's wishes. The cases that I
4 read say that the Government has a right to a
5 unanimous verdict.

6 I don't know of any concept that says the
7 Government must concede the defendant's desire for
8 anything less than the unanimous verdict at a certain
9 point, where it comes to avoid another trial. If you
10 are successful, then I'll follow that new rule, but at
11 the present time I find that the Government had no
12 such obligation, and that the double-jeopardy right
13 did not attach, but as I say, and again I don't say it
14 lightly, you make a very interesting argument.

15 MS. ROSNER: One more matter for the record,
16 your Honor. The Court noted the distinction between
17 this case and Vega, on the ground in Vega that there
18 was no violation of the province of the jury, in
19 essence, the sounding of the jury was known.

20 THE COURT: Don't hang on everyone of my
21 observations, please.

22 MS. ROSNER: Your Honor, I can take it that
23 you put some weight on distinguishing this from Vega.

24 THE COURT: I am trying to distinguish Vega
25 because I know that Vega is the substantial
authority for your argument, but the distinction I

1 am making for the purposes of determination is that in
2 Vega, the Government consented to dismiss the juror,
3 in this case it did not. I say, if the Government had
4 consented in this case --

5 MS. ROSNER: We wouldn't be here, nor would my
6 client.

7 THE COURT: I don't know.

8 MS. ROSNER: That I know, Judge. I was merely
9 going to note --

10 THE COURT: The next question is the Court's
11 approval as absolutely necessary. It always bothered
12 me, I have never stood in the way of clients who wanted
13 to reduce the number of jurors or less than a
14 unanimous vote, and I don't know of any judge that did
15 stand in the way, but the rule says with the consent of
16 the Government and the approval of the Court, and I don't
17 know why it's there. It must mean something --

18 MS. ROSNER: One note on that, Judge. I think
19 consent and approval must mean different things,
20 because otherwise they would say the consent of the
21 Government and the consent of the Court. I think
22 approval of the Court means approval of the knowing
23 waiver, making sure that the parties understand the
24 consequences of their acts, rather than participation
25 in the sense of having an interest in which of the two

1 procedures is utilized.

2 THE COURT: Now, you have an exception and the
3 motion in all respects is denied.

4 MS. ROSNER: One other thing, Judge. I noted
5 in your opinion in the Toscanino case, a footnote to
6 the effect that Mr. Russo had abandoned his contention
7 under Toscanino. I most respectfully say that I have
8 no abandoned any argument that could be made under the
9 case law of the United States v. Toscanino. I have
10 not been able to gather the evidence necessary to
11 present the motion, and have not done so because I
12 am well aware, or I believe that presents less than a
13 prima facie case, and that indication might preclude
14 me subsequently from re-opening the application, but
15 my client has never disavowed the extent of the
16 kidnapping or the torture, or disclaimed the
17 illegalities involved.

18 I simply don't have the proof, but the
19 Plaintiff, there is no waiver here, because it's a
20 jurisdictional application and it has not been made
21 because I lack the proof to date, for the record.

22 THE COURT: I have been more than just
23 glancing at the Toscanino matter, and the law involved,
24 and it is my understanding that unless you challenge
25 the jurisdiction of the Court before trial, you waive

67A

United States District Court for

United States of America vs.

Eastern Dist. of NY

DEFENDANT

MIGUEL RUSSO

DOCKET NO.

73 CR 164

N'FILED

JUDGMENT AND PROBATION/COMMITMENT ORDER

AO 245 (6/74)

In the presence of the attorney for the government
the defendant appeared in person on this date

MONTH 3 DAY 4 YEAR 1977

COUNSEL

☐ WITHOUT COUNSEL

However the court advised defendant of right to counsel and asked whether defendant desired to have counsel appointed by the court and the defendant thereupon waived assistance of counsel.

☒ WITH COUNSEL

Nancy Rosner, Esq.

(Name of counsel) U. S.

PLEA

☐ GUILTY, and the court being satisfied that
there is a factual basis for the plea,☐ NOLO CONTENDERE

NOT GUILTY

There being a finding/verdict of

☐ NOT GUILTY. Defendant is discharged☒ GUILTY.FINDING &
JUDGMENT

Defendant has been convicted as charged of the offense(s) of violating T-21, U.S. Code, Secs. 173, 174, 846 and 963 in that from on or about Jan. 1, 1965 up to and including the date of the filing of this indictment, the defendant, with others, did combine, conspire and agree together to import and bring into the U.S. large amounts of heroin, contrary to law and to conceal buy, sell and facilitate the transportation after the drug had been imported and brought into the U.S.

The court asked whether defendant had anything to say why judgment should not be pronounced. Because no sufficient cause to the contrary was shown, or appeared to the court, the court adjudged the defendant guilty as charged and convicted and ordered that: The defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of

20 years and a fine of \$20,000.

SENTENCE
OR
PROBATION
ORDERSPECIAL
CONDITIONS
OF
PROBATIONADDITIONAL
CONDITIONS
OF
PROBATION

In addition to the special conditions of probation imposed above, it is hereby ordered that the general conditions of probation set out on the reverse side of this judgment be imposed. The Court may change the conditions of probation, reduce or extend the period of probation, and at any time during the probation period or within a maximum probation period of five years permitted by law, may issue a warrant and revoke probation for a violation occurring during the probation period.

COMMITMENT
RECOMMEN-
DATION

The court orders commitment to the custody of the Attorney General and recommends,

It is ordered that the Clerk deliver a certified copy of this judgment and commitment to the U.S. Marshal or other qualified officer.

SIGNED BY

☐ U.S. District Judge☐ U.S. Magistrate

Date

3/4/77

(18) MR

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA

Docket Number 73 Cr 164

MIGUEL RUSSO

J. Michler
(District Court Judge)

NOTICE OF APPEAL

Notice is hereby given that MIGUEL RUSSO appeals to
the United States Court of Appeals for the Second Circuit from the ☒ Judgment ☐ order ☐ other
(specify) _____ entered in this action on March 4, 1977
(Date)

Date 3/9/77
To:

Hon. David G. Trager
U.S. Attorney
225 Cadman Plaza East
Brooklyn, N.Y. 11201

Address

Nancy Rosen
(Counsel for Appellant)
401 Broadway
New York, New York 10013

Phone Number 925-8844

ADD ADDITIONAL PAGE IF NECESSARY

(TO BE COMPLETED BY ATTORNEY)

TRANSCRIPT INFORMATION - FORM B

QUESTIONNAIRE

- ☐ I am ordering a transcript
☒ I am not ordering a transcript
 Reason:
☐ Daily copy is available
☐ U.S. Attorney has placed order
☐ Other. Attach explanation

TRANSCRIPT ORDER

- Prepare transcript of
☐ Pre-trial proceedings
☐ Trial
☐ Sentence
☐ Post-trial proceedings

DESCRIPTION OF PROCEEDINGS
FOR WHICH TRANSCRIPT IS
REQUIRED (INCLUDE DATE)

The ATTORNEY certifies that he will make satisfactory arrangements with the court reporter for payment of the cost of the transcript. (FRAP 10(b)) ☒ Method of payment ☐ Funds ☐ CJA Form 21

ATTORNEY'S signature

DATE

March 9, 1977

COURT REPORTER ACKNOWLEDGEMENT

To be completed by Court Reporter and
forwarded to Court of Appeals

Order received

Estimated completion date

Estimated number
of pages

Date

Signature

COPY FOR DEFENDANT

rosner

AFFIDAVIT OF PERSONAL SERVICE

STATE OF NEW YORK
COUNTY OF RICHMOND ss.:

EDWARD BAILEY being duly sworn, deposes and says, that deponent is not a party to the action, is over 18 years of age and resides at 286 Richmond Avenue, Staten Island, N.Y. 10302. That on the 6 day of May, 19 77 at No. 225 Cadman Plaza East, Brooklyn, NY

deponent served the within *Appendix*
upon U.S. Atty., East. Dist. of NY

the Appellee herein, by delivering true
copy(ies) thereof to him personally. Deponent knew the person so
served to be the person mentioned and described in said papers as the
Appellee therein.

Sworn to before me this
6 day of May 1977

William Bailey
WILLIAM BAILEY
Notary Public, State of New York
No. 43-0132945
Qualified in Richmond County
Commission Expires March 30, 1978

Edward Bailey
Edward Bailey